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THE WHITE HOUSE

WASHINGTON

June 4, 1973

MEMORANDUM FOR: Members of the Working Group
on Foreign Classified Documents

FROM: Richard Tufaro

SUBJECT: Materials for Working Session

In connection with the meeting on Friday, June 8 at 10:00 A.M. in Room 111 of the Archives on the classification and declassification of foreign classified information and material under E.O. 11652, the following documents are forwarded for your consideration. They should be reviewed prior to the meeting so that our work can proceed expeditiously.

1. Memorandum from Charles N. Brower, dated March 7, 1973.
2. Memorandum from Robert T. Andrews, dated April 26, 1973.
3. Memorandum from James E. O'Neill, dated June 1, 1973.
4. Working draft on "Classification and Declassification of Foreign classified information and material under E.O. 11652," prepared by the undersigned.

It may also be useful to review the minutes of the ICRC meeting of March 7 in which this problem was discussed.

State Department, NSC, OSD reviews completed



DATE: June 1, 1973

National Archives and Records Service
Washington, D.C. 20408

REPLY TO
ATTN OF:

Deputy Archivist of the United States

SUBJECT:

Foreign classified material in the custody of the
National Archives and Records Service

Richard C. Tufaro

At a time when the administration has initiated a vigorous declassification program aimed at opening many of our own classified documents, the National Archives is forced into the unhappy position of keeping millions of foreign classified documents closed indefinitely. Declassification of foreign originated documents has been at best haphazard, and more often not attempted. We firmly believe that a procedure, consistent with the current declassification program, should be devised to open to the fullest extent foreign classified material.

We estimate that among the accessioned records of the National Archives there are approximately 10 million pages of foreign classified material. Broken down by time period this includes 250,000 pages of pre-1942 material, 6 million pages for the 1942-45 period, and 3 3/4 million pages for the 1946-54 period.

The scope of the problem posed by the presence of large numbers of foreign security classified documents among World War II records in the National Archives was recently revealed in a survey of the individually identified foreign classified documents encountered in ten different record groups.

The great number of countries involved is demonstrated in the records of the Army Service Forces. While many of the foreign classified documents are of British origin, there are significant quantities originated by Indian and Soviet Government agencies and a wide scattering of documents from Argentina, Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Denmark, Ecuador, Finland, Iceland, Iran, Italy (post-capitulation), Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Turkey, Venezuela, and Yugoslavia. The greater part of these relate, naturally, to lend-lease, logistics, and supply matters.

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The quantity of documents of foreign origin is demonstrated by the review thus far conducted of records of the Research and Analysis Branch of the Office of Strategic Services and selected portions of the State Department's central file. In the former, fully 20 percent of the records are of foreign origin. Again, while many of these are of British origin a significant number of French, Dutch, Norwegian, Polish, and Chinese documents are also present. Similarly, in State Department records the incidence of foreign classified material is very high. Among the files thus far reviewed are documents originated by the Imperial Prisoner of War Commission, the International Commission for Penal Reconstruction, the U.S. War Crimes Commission, and such war-time neutrals as the Swedish and Swiss Governments.

Our inability to take action on such a large number of classified documents dating from the World War II period--and earlier--is a severe hindrance to the effective conduct of the declassification program and is likely to evoke researcher criticism of the program. The National Archives is currently conducting extensive page-by-page review of several record series solely to locate and segregate foreign classified documents. Many of these series could be bulk declassified if our only concern was with U.S. classified documents. The result of the search for foreign classified documents is increased time required to conduct the reviews, increased man-power costs, and subsequent delays in reviewing U.S. documents.

In 1975 the vast majority of U.S. originated material for the World War II period will be open to research. Unless some method is adopted to deal with them, foreign classified documents will comprise the bulk of the material still being withheld from researchers.

U.S. Departments have approached the problem of handling foreign classified material in different ways at different times. Until 1972, the State Department grouped its records into three categories--open, restricted, and closed. All records in the open period for 1910-29, including foreign classified documents were available for research, but foreign classified documents could not be reproduced. In 1958 the National Archives asked the State Department for blanket authority to declassify and open pre-1930 records so that they could be microfilmed. A limited authority was granted. Certain categories of material could not be opened, but foreign classified documents could be. However, in 1961 the State Department reversed its original decision stating that they had no authority to declassify foreign classified documents. Thereafter, foreign classified material was added to the list of material excluded from declassification and opening.

Before 1961 no attempt was made to remove foreign classified records from the 1910-29 files. From 1961 to 1969 foreign classified documents in the 1930-39 files were removed as researchers asked to see the files. Beginning in 1969 foreign classified documents were no longer removed from the 1930-39 files although those that had been previously removed remain segregated. Foreign classified documents in the 1940-46 files are removed as researchers request the files. Exceptions to this practice include the records of defunct governments (e.g., pre World War II Polish Government) and defunct organizations (e.g., UNRRA).

The policy of removing foreign classified material from the State Department files was modified in 1969 when the British Government announced that British originated documents over 30 years old could be opened on the same basis as U.S. documents of the same type. In January 1972, the British Government moved this "open" period through 1945 for foreign relations and civil agency material. In January 1973, the National Archives was informed that the British and Dominion documents through 1945 containing military information could be declassified unless they fell into specified sensitive categories. Except for British documents, most foreign classified documents remain classified at their original levels and closed to research.

Although the general policy has been that foreign classified information should be protected until a foreign government specifically authorizes the possessor to open documents they originated (as in the case of the British Government), the State Department has made some exceptions to this rule. As was previously mentioned, defunct government records such as the pre-World War II Polish records are open, and defunct organization records such as those of UNRRA are open. Also the original security markings on German and Italian originated records of the World War II period are not recognized. Recently a State Department policy statement advised the National Archives that "the records originated since the recognition of the Provisional Government of France, by the United States and its major allies on October 23, 1944, should be subject to the treatment generally accorded classified records of friendly foreign governments." But, French documents originated by the Vichy government (July 10, 1940-45) which was "subject to Nazi pressure and domination" can be declassified. Also, records of the French Committee of National Liberation (June 1943-October 23, 1944), and the Free-French National Committee (September 24, 1941-43) can be declassified

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because they "were not considered by the United States as representing the entire French nation." Consequently, French documents originated prior to July 10, 1940 as well as those originated after October 23, 1944, continue to be protected, while those for 1940-1944 are open. In addition to these exceptions, records of the European Advisory Commission (1944-45) have been declassified through the mutual agreement of the British and American Governments. However, to our knowledge the other two members of the European Advisory Commission, the USSR and France, were not consulted about declassification, although records originated by those Governments are included among the E. A. C. records that are open for research. Finally, it is our impression that the State Department has consulted the USSR about publishing Russian originated documents in Foreign Relations of the United States for some but not for all of the volumes dating from 1933.

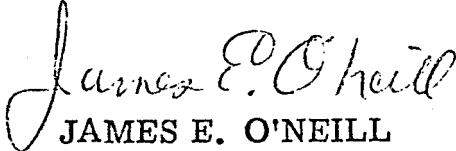
Although the State Department's decisions on whether or not to protect a country's classified documents have been made on an ad hoc basis, the non-recognition of a government, the fact that a government or organization is defunct, or the fact that a foreign government was either hostile or uncooperative, appear to be accepted reasons for not recognizing and protecting some foreign classified material. Other decisions, such as that dealing with the records of the European Advisory Commission, do not seem to be based on a general principle which has application to other records.

The military services have generally treated foreign classified documents in military records in an even more cautious manner. Very few foreign classified military records were declassified while they were in the custody of the military services or after they were transferred to the National Archives. The military's approach to foreign classified documents is illustrated by the attempt made by the National Archives in 1961 to have certain foreign classified military publications declassified. The National Archives approached the Office of the Adjutant General to declassify World War I publications originated by British, French, and Italian authorities which were found in the American Expeditionary Force records. The Adjutant General's Office decided they did not have authority to declassify the publications and would have to approach each government for a determination on its originated publications. After almost a year, the National Archives received authority to declassify the publications. Despite this rather conservative approach, the military has been inclined to take a very liberal view toward opening Russian classified material.

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In the few instances when requests for declassification have been forwarded by the military services to the country of origin for determination, declassification has usually been authorized. However, referring declassification requests to each country of origin is difficult, time consuming, and impractical for all but the most limited requests. As a consequence, most foreign classified material remains closed for an indefinite period.

The President's Executive Order and the work of the Interagency Classification Review Committee in overseeing that Order, have, in less than a year, produced the most significant changes in a generation in making valuable material available for citizens and for the scholars and journalists who serve them. These changes symbolize a new approach to an old problem. They have aroused expectations whose lack of fulfillment will provoke severe criticism among those whose articulateness and influence on the public can seriously harm public acceptance of the declassification program. A large body of indefinitely classified material (or of material kept classified for an inordinately long time) cannot but feed such criticism.


JAMES E. O'NEILL



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DEPARTMENT OF DEFENSE

OFFICE OF GENERAL COUNSEL

WASHINGTON, D. C. 20301

April 26, 1973

MEMORANDUM FOR Mr. Richard Tufaro

SUBJECT: Foreign Classified Information

My attention has been directed to the ICRC Minutes of March 7, 1973, in which State and AEC are reported to have said that "all foreign classified material" is not considered to be exempt from the General Declassification Schedule (GDS). I am informed that this is in violation of the security agreements the United States has signed with various countries. Under these agreements, the United States cannot take unilateral action to downgrade and declassify foreign origin classified information which has been entrusted to the U.S. See attached Change No. 2 to USSAN Instruction 1-69, "Implementation of NATO Security Procedure (U)," December 20, 1969, p. 24. It provides in part, "NATO classified documents may be downgraded or declassified only by or with the consent of the originating office ****."

The U.S. is obligated to respect the security classification that foreign originators have assigned to their information and material for so long as they, not we, say it is classified. They must do the same for our information and material. There is no leeway to "give separate consideration to that sensitive portion of foreign material which warrants classification beyond the 30-year limit," as you suggest. We can request the foreign government to review the continued validity of the classification, but that is as far as we can go.

The following rules have been proposed to me. I believe they deserve consideration.

- a. Whenever the U.S. Government receives documents or other material which have been originated and classified by a foreign government, those documents shall remain classified until downgraded or declassified by the foreign government. Such documents or materials are not subject to the U.S. General Declassification Schedule, and are not

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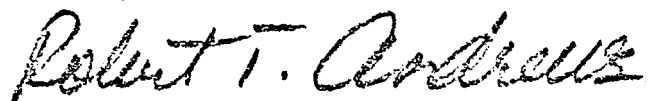
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to be marked with any U.S. downgrading/declassification marking. Such documents are not subject to the 10-year and 30-year declassification reviews specified in E.O. 11652.

- b. Classified information from a foreign originated document which is incorporated into a U.S. document is not subject to unilateral downgrading or declassification by the U.S. Any U.S. prepared document which contains foreign origin classified information must be marked with the XGDS stamp citing the foreign classifier (or document) and exemption category (1). (Only a U.S. RD or FRD requirement would be preemptive.) The foreign originated classified information should be identified specifically so that it is not inadvertently released to third country nationals. The U.S. prepared document is subject to the 10-year and 30-year declassification review requirements of E.O. 11652, but the foreign origin classified information contained therein can be downgraded or declassified only with the approval of the foreign originator.
- c. Information supplied to the U.S. by a foreign source and identified as classified by a foreign source must be treated in the manner stated in b. above for classified information taken from a foreign classified document.
- d. Information received from a foreign source and not specifically identified as classified by the foreign source would be considered for classification and marked according to U.S. standards. Such information, if classified, would be subject to downgrading and declassification according to U.S. requirements.

There is no need to amend E.O. 11652 to cover the foregoing. Foreign originated classified documents are not under U.S. classification jurisdiction. The President has not made them subject to the GDS of E.O. 11652, nor would it be proper under our foreign security agreements to do so. In turn, we expect reciprocal treatment from governments to which we release U.S. classified information and material. Continued classification of foreign origin information or material beyond 30 years requires no action by any U.S. official. However, when warranted, we should request the foreign originator to downgrade or declassify.



Robert T. Andrews
Office, Assistant General Counsel
(Department of State, Foreign Affairs,
Health and Environment)



DEPARTMENT OF STATE

Washington, D.C. 20520

March 7, 1973

MEMORANDUM

To: Mr. Richard C. Tufaro
The White House

From: Charles N. Brower *MB*
Acting Legal Adviser

Subject: ICRC Meeting of March 7

The following, for your records, is the substance of my prepared remarks concerning foreign documents at the ICRC meeting of March 7:

I have been directed by our Council on Classification Policy to bring up at this meeting the question of how classified documents given to us by foreign governments are to be treated. More particularly, many bureaus in the State Department believe that disclosure of foreign documents after 30 years--rather than after 50 years, which is the standard applied by diplomatic practice--may cause problems inasmuch as many of those documents would not be available in the country of their origin and those countries provided their documents to our Government under the understanding that they would be protected for at least 50 years.

The problem may be illustrated by noting that a person would be denied access to material by a foreign country but be able to obtain the material of that country here, thus rendering the foreign country's protections useless after 30 years.

Along this line it is relevant that Executive Order 11652 specifies that "classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material." In many instances, declassification after 30 years will be inconsistent with that principle.

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I have been informed that the amount of foreign documents provided by various governments and international organizations is too voluminous to permit effective consideration of extension of the 30-year line on a case by case basis or to determine the reaction of the parties involved beyond general feelings. The countries which have been contacted have expressed difficulty with declassifying their documents after 30 years.

Thus we are faced with the following options: interpret-- or amend--the Executive Order to clarify that material received from a foreign government or international organization should not be declassified until the other government would release it or agree to its release, or explain to the other governments that our rules have changed and their information will become available more quickly than had been understood when such was given to us.

There is general acquiescence--as a general diplomatic practice--to our disclosing after 50 years even if the other government holds information longer; presumably over time a 30-year rule could be acquiesced to, but to impose such unilaterally at this point could be seen as violating prior tacit agreements. Also, a unilateral step to release documents in violation of such diplomatic practice could result in a diminishing of our ability to receive information from foreign governments and possibly could lead to retaliatory revelations of U.S. documents before even the 30-year deadline.

THE WHITE HOUSE
WASHINGTON

June 4, 1973

CLASSIFICATION AND DECLASSIFICATION OF FOREIGN
CLASSIFIED INFORMATION AND MATERIAL UNDER
E. O. 11652

Statement of Problem:

The United States Government receives and retains large volumes of foreign originated classified information and material. Although there are a few bilateral agreements for the protection of foreign classified material, in most cases continued classification and protection is based upon principles of international comity recognized in E. O. 11652. Unless the concept of automatic declassification established by E. O. 11652 is applied to foreign classified information and material, an impossible declassification problem will be created resulting in the indefinite classification of such material.

Objective:

To promote a system for the protection and subsequent automatic and early declassification of foreign classified information and material which will find acceptance in the international community and not damage U. S. foreign relations.

Discussion:

The laws of another country have no validity by themselves within the U. S. Rather legal protection of foreign originated classified documents within the U. S. must be derived from laws, treaties, or executive orders promulgated by the U. S. government.

In the past, a few recognized arrangements with such international organizations such as NATO, SENTO, and SEATO existed to cover security protection of their classified documents. In addition, certain

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reciprocal arrangements exist between the U. S. Joint Chiefs of Staff and the British Chiefs of Staff concerning records of combined interest. For the most part, however, the international principle of comity seems to have been the basis for the various departments policy of protecting such foreign classified material. As Mr. Brower indicated in his presentation to the ICRC, 50 years is generally accepted in the international community as the period for the protection of classified information.

While recognizing the value of this reciprocal protection system in the absence of official U. S. regulations, in most cases the result has been indefinite protection of foreign classified documents regardless of the diminishing need for protection with the passage of time. The procedures and authority for the protection of these foreign documents is now contained in E. O. 11652, which establishes new guidelines for dealing with declassification of U. S. and foreign classified information. It is incumbent upon us to work to apply the progressive standards of E. O. 11652 to the declassification of foreign classified information and to seek acceptance of them in the international community rather than taking a conservative approach which will result in blanket exemption of these materials from declassification.

1. Receipt and protection of foreign classified information.

U. S. departments deal with foreign classified material after it has been created and after the classification level has been established by the originating country. Section 4 (C) of the Executive Order states:

"Classified information or material furnished to the U. S. by a foreign government or international organization shall either retain its original classification or be assigned a U. S. classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government which furnished the information or material."

This section deals only with the problem of the level of classification and the degree of protection to be afforded foreign classified information or material furnished the U. S. government. In practice, a foreign

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classified document is given protection comparable to the equivalently classified document of U. S. origin. Section 4 (C) does not, however, deal with the problem of declassification of foreign classified documents. Guidance on this problem is contained in Section 5 of the Order.

2, Exemptions from the General Declassification Schedule.

Section 5 (B) (1), which is the only other specific reference to foreign classified material in the Executive Order, indicates that foreign classified information may be exempted from the General Declassification Schedule:

"Classified information furnished by foreign governments or international organizations and held by the U. S. on the understanding that it be kept in confidence (may be protected beyond 10 years)."

This section implies that departments receiving foreign and international organization classified information and material after June 1, 1972, will determine whether the material should be marked "exempt" from the General Declassification Schedule by an official authorized to originally classify material as Top Secret. Application of Section 5 (B) to foreign originated material requires the department receiving the information to make a determination based on the following questions:

- (a) Does the information require protection beyond 10 years?
- (b) If the information requires extended protection, at what future date can the information be declassified?

In short, Executive Order 11652 does not authorize departments to apply blanket exemptions to foreign classified material. Individual determinations must be made for foreign classified documents in the same manner as those made for U. S. originated documents. The decision to exempt or not to exempt a foreign classified document from the GDS is based upon guidance from the originating country or on an internal departmental determination. Foreign classified documents which are subject to the GDS will become declassified in six, eight or ten years. Those exempt from the GDS will be protected for the time period indicated, subject to the application of the thirty year rule.

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3. Declassification of foreign classified information or material after thirty years.

While foreign classified material has some unusual characteristics, the approach detailed in the following sections would bring the handling of foreign classified information into line with the provisions of E. O. 11652 and would probably find ready acceptance in the international community.

(a) The same reasoning and categorization already applied to 30-year-old U.S. originated classified information would be applied to 30-year-old foreign classified information. U.S. departments and agencies have issued guidelines to the Archivist for declassification review of 30 year old material to exclude from declassification documents of continuing security sensitivity. It is suggested that these guidelines be consolidated and codified to form the basic guidelines for a review of similar foreign classified information. For example, foreign intelligence sources and methods and communications intelligence would be types of foreign information that would be subject to protection beyond 30 years. Particular security sensitivities of the countries originating the information could be added to the guidelines to provide the basis for review of thirty year old foreign classified material. In other words, only certain limited categories of foreign classified information would be exempt from automatic declassification after the material becomes 30 years old.

(b) As potentially exempt documents are encountered during review, they would be referred for necessary action to the U.S. department having primary subject matter interest. That department would review the documents referred to it and determine from its expert knowledge and familiarity with current sensitivities whether the information required further protection, and if so, how long this protection should be extended. If the department felt that it could not make a determination in a specific instance, referrals could be made to the country of origin. The State Department and all of the military services have direct channels of communication with most foreign countries and should be able to obtain a response from those governments within a reasonable time, Civil agencies without such contacts abroad have to coordinate such requests through a designated office in the Department of State. The need for referrals to the country of origin would probably be minimal.

(c) Section 5 (E) (2) would continue to apply. The heads of departments having primary subject matter interest would certify to the Archivist of the U.S. itemized lists of 30 year old exempted foreign classified documents requiring continued protection, state the reasons for the decision, and the length of continued protection required. The process would be identical

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to that used for U.S. originated documents which require protection beyond 30 years.

(d) Foreign originated documents which have been certified by the heads of departments having primary subject matter interest as requiring protection beyond 30 years are subject to the mandatory review provisions of the Executive Order.

4. Mandatory Review of Exempted Foreign Originated Material

Foreign classified material which has been exempted from the GDS and which is ten or more years old would be subject to the mandatory review provisions of Sections 5 (C) and (D) of E. O. 11652. U.S. departments having primary subject matter interest must accept and process mandatory review requests for exempted foreign classified documents in essentially the same manner as requests for U.S. originated material. Departments receiving the mandatory review requests can make declassification determination themselves or refer the requests to the countries of origin for determination. There are, of course, certain practical problems involved in making determinations on more current material which do not arise with material over 30 years old. If the departments must refer documents to the country of origin, the requester should be informed of this procedure and advised that it may take some time to receive a response from the country involved. Further a requester would be allowed to appeal a denial of his request unless the document was forwarded to the country of origin for determination.

Conclusion:

Foreign classified documents are subject to E. O. 11652, including mandatory review and automatic declassification after 30 years. The U.S. agency of primary subject matter interest must assume responsibility for acting on mandatory review requests, including denying them and must assume responsibility for certification of documents to be kept classified beyond 30 years.

Richard C. Tufaro